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CRIMINAL LAW

PART I

INSTRUCTION PAPER

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AMERICAN SCHOOL OF CORRESPONDENCE

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CRIMINAL LAW

PART I

CHAPTER I

CRIME

NATURE OF CRIME

§ 1. **A Public Wrong.** A crime is a wrong which the state looks upon as peculiarly affecting itself. Other wrongs there are, often more wicked than crime, but if the state does not choose, for whatever reason, to regard them as such, they are not crimes. Their criminality depends, not on their inherent nature, but on the way the state looks at them. Accordingly, the number and the kind of crimes will vary with the government and the times. In a government intimately connected with religion, much stress will be laid on matters of religious belief and conduct, while the democracies of today will attempt to regulate the most complicated transactions of modern business by means of the criminal law.

§ 2. **Punishable by the State.** Where the state is directly concerned with the wrong, as where an official is guilty of a willful breach of duty, or where public property is intentionally injured, it is easy to see that the state is peculiarly affected; and, likewise, where there is public disorder, or a direct attack on the government, or its money is counterfeited; but, perhaps, in most cases of crime, the wrong to the government is not so obvious. We must have some test to determine whether the state regards the wrong as peculiarly affecting itself. We have such a test in the

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liability of the wrongdoer to punishment by the state. If the wrong is punishable by the state it is criminal.

The most common forms of punishment are loss of life, imprisonment, and fine. To determine whether an act is a crime, therefore, it is sufficient in most cases to turn to the statute books or the decisions of the courts and see whether the act is punishable in one of these ways. There are other forms of punishment, however, and, sometimes, a law with few of the earmarks of an ordinary penal statute will be held to be a criminal law. Thus in the case of Cummings v. Missouri,[1] the Supreme Court of the United States held that a provision of the Missouri Constitution disqualifying all persons who had taken any part in the Rebellion from holding office or acting as priests, teachers, or attorneys, was a criminal law increasing the punishment for crime, and so *ex post facto,* although in form a law prescribing qualifications for office, and for carrying on certain callings. The Supreme court considered that the denial of the right to hold office or to carry on a lawful calling was as distinctly a form of punishment as would have been the imposition of a fine or imprisonment.

Again, damages given in a civil action may be "penal", that is, more than sufficient to compensate the injured party for the wrong done to him, and although one would hardly think of calling a man a criminal because he had had to pay penal damages, yet, it is clear that there is an element of punishment by the state in such damages, and that to that extent the wrong partakes of the nature of crime.

But, not every imprisonment or fine under the authority of the state is intended as punishment. A man may be imprisoned for contempt of court in violating an injunction or refusing to answer a proper question, and may sometimes be arrested in supplementary proceedings to ascertain whether he has property that may be levied on to satisfy a judgment against him; and the old imprisonment for debt is familiar to every one. Again, a man may be

[1] 4 Wall. 277.

arrested to await trial, although he may be acquitted subsequently. In many of these cases the detention is merely to secure the presence of the person in court, or to compel him to live up to some civil obligation, and is not intended as punishment. In many cases of contempt of court, however, punishment is the object of the imprisonment, and yet, if such contempt will not render the wrongdoer liable to criminal prosecution, he is not ordinarily considered a criminal. So, also, the violation of a municipal ordinance is not generally considered a crime. It is of local application, as the order of a court is of individual application, whereas what is generally thought of as criminal law is neither local nor individual.

§ 3. **Criminal Process.** There are wrongs, then, criminal in their nature because punishable by the state, which are not ordinarily thought of as crimes. They are not ordinarily so thought of or treated under the head of criminal law unless they will subject the wrongdoer to criminal process. Criminal process is the process commenced by the indictment of a grand jury or the filing of an information by the public prosecutor, although minor offenses against the general law of the state, such as drunkenness, may be tried by police magistrates by more summary process. Leaving out of consideration these minor offenses, the ordinary test as to whether a wrong is a crime, is the liability of the wrongdoer to be proceeded against by indictment or information. There are cases, however, where proceedings commenced by indictment or information are considered essentially civil. Thus, in England, the ordinary method of securing the abatement of a public nuisance is by indictment, although the courts recognize the proceeding in many cases as essentially civil, while in this country the information in the nature of a *quo warranto* (by what authority) to try title to office is generally considered civil in nature, though criminal in form.

§ 4. **Crime Distinguished from Tort.** There are many wrongs of which the state takes notice, yet does not punish, but gives the person wronged a right of action against the

wrongdoer. These are known as civil wrongs and are called torts. A wrong may be both a crime and a tort. If it is punishable by the state, it is, in the broad sense of the word, criminal; if it gives the person wronged a right of action against the wrongdoer, it is a tort. The object of the state in a criminal prosecution is punishment; the ordinary object of the person engaged in a tort action is compensation for the wrong done, or restitution of the property taken. Sometimes, acts which were once regarded by the state as torts only, have since come to be regarded by the state as crimes. Thus, cheating was not a crime at common law unless the cheat had used false weights or measures, or tokens, or there was a conspiracy, and so in the case of Commonwealth v. Warren,[2] where the defendant, under the pretense that his name was William Waterman and that he was a grocer in good credit in Salem, had received shoes on credit from one Adams, the court, among other things, said:

"If, therefore, Adams was cheated out of his shoes by the defendant, without using false weights, measures, or tokens, and by no conspiracy, but only by his credulity in believing the lies of the defendant, although he may have an action against the defendant to recover his damages, yet this indictment cannot be maintained, whatever false pretenses the defendant may have wickedly used."

At the present time such an act would be punishable under the statutes against obtaining property under false pretenses.

§ 5. Consent of the Injured Party. A tort is a private matter between the parties concerned. If the party injured consented to the injury, he cannot ask for damages for that which was done with his permission. It is his own affair if he precludes himself from the recovery of damages by his previous consent. And there are certain acts which are crimes only when done without the consent of the other party. Thus, an essential element of common-law rape is that the act be committed without the consent of the

[2] 6 Mass. 72.

woman, while in larceny it is essential that the taking be without the consent of the owner. But in the case of these crimes, consent is fatal to the crime, not because of any general principle, as in the case of torts, but because the absence of consent is expressly made an element of the particular offense. Thus, suicide is a common-law crime, and although the completed crime cannot in its nature be punished, it is a not uncommon sight in at least one city for a policeman to attend the hospital where the attempted suicides are taken in order to hand them over to the law when they shall have recovered from their injuries, and to prosecute them.

In the case of Regina v. Bradshaw,[3] the defendant was indicted for the manslaughter of one Herbert Dockerty who had died as the result of injuries caused by the defendant in a game of Association Football. In summing up the case to the jury, Lord Bramwell said:

"The question for you to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death, and the question is whether that act was unlawful. No rules or practice of any game, whatever, can make that lawful which is unlawful by the law of the land; and the law of the land says that you shall not do that which is likely to cause the death of another. For instance, no persons can by agreement go out to fight with deadly weapons, doing by agreement what the law says shall not be done, and thus shelter themselves from the consequences of their acts."

§ 6. Fault of Injured Party. The private nature of tort, the public nature of crime, leads to a like result where the one injured has been himself at fault. Thus in Regina v. Swindall,[4] where the defendants were indicted for the manslaughter of an old man whom they had run over and killed, the court said:

"The prisoners are charged with contributing to the death of the deceased, by their negligence and improper conduct; and if they did so, it matters not if he were deaf,

[3] 14 Cox C. C. 83. [4] 2 C. & K. 230.

or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy against the other for damages. So, in order that one shipowner may recover against another for any damages done, he must be free from blame; he cannot recover from the other if he has contributed to his own injury, however slight the contribution may be. But, in the case of loss of life, the law takes a totally different view—the converse of that proposition is true; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification whenever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person."

So, too, it is no defense to a criminal prosecution that the victim of the crime with which the defendant is charged was at the time engaged in a criminal design on the defendant. Thus, in a prosecution for obtaining property under false pretenses, it is generally held not to be a defense to show that the victim of the fraud was himself attempting to cheat the defendant. In People v. Martin,[5] the court said:

"If the party defrauded is also guilty of a violation of the law, he, too, should be prosecuted, rather than his offense should serve as a shield to the other's crime. The offense is committed against the public, and not against the individual. The guilty party is prosecuted in the interest of the people of the state, and not in the interest of the party defrauded of his property. There is no principle of law that will bar the state from prosecuting a criminal because some other person is a *particeps criminis.*"

§ 7. Condonation. The forgiveness of the party wronged will not wipe out the crime, nor will the restitution of the property taken, and if the owner of property receives it back from the thief on condition that he will not prosecute

[5] 102 Cal. 558.

the latter, he is guilty of compounding a felony. In the case of Fleener v. State,[6] the defendant had been convicted of embezzling the funds of an express company. As one of the grounds for a new trial it was urged that as the defendant had hired a guarantee company to make his bond for the faithful performance of his duties, and as the guarantee company had paid the express company the amount of its losses, the express company had no longer any interest at stake, and the defendant was not guilty. But the court said:

"In this the defendant is mistaken. This is no longer a controversy between himself and the two companies, or either of them, and has not been since he fraudulently appropriated the money of the express company, if, indeed, he did so appropriate it. It is now a controversy between the State of Arkansas and himself, which the State will not permit either one of the said companies to determine at present or in the future; nor will the State acknowledge the validity of any settlement of it, by anything they both, or either of them, have done in the past."

It is frequently provided, however, that the subsequent marriage of the parties is a bar to a prosecution for seduction.

§ 8. **Participation of a Public Officer.** But, although the consent, or the fault, or the forgiveness of the injured party will not avail the accused, it is familiar law that the executive may pardon him; and ordinarily, the prosecuting attorney has considerable discretion in the prosecution of crime, and in the promise of immunity for turning state's evidence. But for the act of the official to be binding on the state, it must be duly authorized; and where an assistant district attorney handed over certain records for which he had been offered a bribe, and the taker claimed that he could not be guilty of an attempt to commit larceny because the property had been taken with the consent of the owner, (the state) the court held that the district attorney had no authority to part with the records in the way he had done, that, therefore, there had been no consent on the part of

[6] 58 Ark. 98.

the state, and, accordingly, all the elements of larceny were present.[7]

And, although the law does not encourage entrapment into crime in order to secure convictions, the mere fact that a government official has furnished the opportunity for the particular offense does not render it the less criminal. Thus, in Grimm v. United States,[8] where a postoffice inspector had suspected the defendant of dealing in obscene pictures, and to secure evidence against him had written for a supply of them, upon which the defendant had mailed them to him and was now being prosecuted for this, the court said:

"It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The facts that the letters were written under an assumed name and that he was a government official—a detective, he may be called—do not of themselves constitute a defense to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant responding thereto, violated the law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such official."

KINDS OF CRIMES

§ 9. **Felonies.** Felonies appear to have been originally violations of the feudal obligation binding lord and vassal. At any rate, it early came to be the law that the goods of the felon should be forfeited to the lord, and this fact must have inclined the landlords to look with favoring eyes on the general extension of the term felonies to the more serious crimes.

High treason seems to have been a felony under the early law, but at an early date goods forfeited for high treason went to the king and not to the lord, and soon high treason

[7] People v. Mills, 178 N. Y. 274. [8] 156 U. S. 604.

came to be recognized as in a class by itself. Both high treason and the felonies, with the exception of petty larceny, were punishable at common law with loss of life.

The principal common-law felonies were homicide, arson, rape, robbery, burglary, and larceny. A common test of the felonious character of a crime today is that it should be punishable capitally or by imprisonment in the state penitentiary or prison. The United States Supreme Court has applied the same definition to infamous crime;[9] although, in a broader sense, infamous crimes include not only felonies and treason, but less serious crimes which render the criminal incompetent to testify as a witness. These less serious crimes usually involve falsehood, and affect the administration of justice.

§ 10. Misdemeanors. Indictable offenses less serious than felonies and treason are misdemeanors. It is the great residuary class of indictable crimes, including at common law such offenses as perjury, battery, libel, and conspiracy, but not including a multitude of minor offenses, such as drunkenness, which were punishable at common law by the justices of the peace on summary process, but for which the law had no fitting designation. For offenses of this kind to be properly called crimes, it is generally necessary that they should be punishable by the law of the state as a whole. Violations of municipal ordinances are not generally considered crimes.

§ 11. Statutory and Common-Law Crimes. In most, if not in all of the states today, there are criminal codes. In other words, much of our criminal law is statutory law. Some states have even gone so far as to do away with common-law crimes altogether, and others have confined the punishment of purely common-law crimes within narrow limits. And yet, even these states derive the great bulk of their criminal law from the common law of England. They may have given that law statutory form, and may have changed a detail here and a detail there, and even made wholesale changes in the penalties imposed, and

[9] *Ex parte* Wilson, 114 U. S. 417.

yet it remains true that the great bulk of the law is good common-law doctrine. Sometimes a crime is named and a penalty imposed, leaving the definition of the crime to be determined by the common law, and even where the definition is given, it is generally little more than the definition of the common law and needs explanation by a resort to the common-law authorities. The changes themselves are often unintelligible without a knowledge of what was intended to be changed.

However carefully drawn the definition of the crime may be, there are certain elements which each crime has in common with other crimes which will not be included in the definition of the particular crime, and for the determination of which resort must ordinarily be had to the common law. Thus, the rules as to responsibility for crime, as in the case of insanity, or as to excuse for crime, as in the case of self-defense, are general, and not to be found in the definition of a specific crime. Sometimes, however, it is difficult to determine whether a general common-law principle is, or is not, to be read into the statutory definition. Thus, it came to be one of the well-settled common-law principles that a reasonable, *bona fide* mistake of fact, as long, at least, as the fact believed to exist was not wrongful, would be a good defense to a criminal charge. For instance, if a man, in good faith, and with reasonable caution, should kill an innocent person in his house under the belief that he was a burglar, he would not be guilty of crime. Is such a principle to be read into a statutory crime where it is not said whether the criminal act must be done "knowingly" or "intentionally"?

This was the question before the court in Regina v. Tolson,[10] where a woman was charged with bigamy under a statute which provided that any one being married, who should marry any other person during the life of the former husband or wife, should be guilty of felony, with the proviso that nothing in the act should extend to any such person whose husband or wife had been continually absent

[10] 23 Q. B. Div. 168.

for the last seven years and should not have been known to be living during that time. In this case the woman had acted upon information of her first husband's death, which the jury found that she, upon reasonable grounds, believed to be true. The court held that the common-law principle of a reasonable mistake of fact was to be read into the statute, and that the woman was not guilty. The Supreme Court of Massachusetts in a similar case came to a contrary conclusion.[11] They considered that the legislature had intentionally excluded the common-law principle from the statute.

§12. Malum in Se and Malum Prohibitum. We have already seen that a wrong is not a crime of itself, but because the state regards it as such. Accordingly, the distinction between *malum in se* and *malum prohibitum* has been declared unsound, and if its only meaning in the criminal law were that there are certain acts which are crimes in themselves, in contrast to other acts which are crimes because prohibited, it certainly would be unsound. A satisfactory explanation of the distinction is given in the case of State v. Horton,[12] where the court said:

"An offense *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community; whereas an act *malum prohibitum* is wrong only because made so by statute. For the reason that acts *mala in se* have, as a rule, become criminal offenses by the course and development of the common law, an impression has sometimes obtained that only acts can be so classified which the common law makes criminal, but this is not at all the test. An act can be, and frequently is, *malum in se,* when it amounts only to a civil trespass, provided that it has a vicious element, or manifests an evil nature, or wrongful disposition to harm, or injure another in his person or property."

The court did not hesitate to declare that the offense of the defendant in hunting on land without the written permission of the owner and in contravention of the stat-

[11] Commonwealth v. Mash, 7 Metc. 472. [12] 139 N. C. 588.

ute was merely *malum prohibitum*. The principal importance of the distinction is in connection with the crime of manslaughter.[13] If an act *malum in se* results by accident in the death of a human being, the offender is guilty of manslaughter, or, perhaps, if the act is serious enough, murder. If the act is merely *malum prohibitum*, the fact that it accidentally results in death will not make the homicide criminal.

JURISDICTION OVER CRIME

§ 13. Federal and State. By the Federal Constitution Congress is given power "to provide for the punishment of counterfeiting the securities and current coin of the United States,[14] to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations,"[15] and "to declare the punishment of treason," with the proviso that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained."[16] This is all the express power of general criminal legislation given to Congress, but under the power to make all laws which shall be necessary and proper for carrying into execution the express powers granted, she has a very wide implied power, and has exercised it extensively. Federal criminal legislation has been enacted with regard to smuggling, illicit liquor manufacture, sending improper matter through the mails, rebating by railroads in interstate traffic, and a host of other subjects. As with the other powers of Congress, however, authority in each case must be expressly or impliedly found in the Constitution. The residuary power of criminal legislation lies with the states, and this residuary power covers the great bulk of common-law crime.

§ 14. No Common-Law Jurisdiction of Crime in the Federal Courts. The Supreme Court of the United States is the only United States court which derives jurisdiction directly from the Constitution, and nothing is expressly

[13] See *infra*, 103.
[14] Art. I, § 8, par. 6.
[15] *Id.* par. 10.
[16] Art. III., § 3, par. 2.

said of criminal jurisdiction. The other Federal courts derive their jurisdiction from Congressional Act, so that, even in a case like that of counterfeiting money, they could not take jurisdiction over the case without statutory authority. A much more extreme claim of jurisdiction in the Circuit court was made in the case of United States v. Hudson,[17] where the defendant was prosecuted in the Circuit court for a libel on the President and Congress of the United States. No express power to punish such crimes is given to Congress, and, although the court did not decide that Congress would not have the implied power to punish them, it held that, in the absence of congressional authority, the Circuit court was without jurisdiction. It is evident that the court was also of opinion, that even had Congress conferred all the judicial power of the United States with regard to crimes on the Circuit court, the latter could not have tried even such a case as that of counterfeiting, unless Congress had made statutory provision for its punishment. In other words, the court was of opinion that there are no Federal common-law crimes. It is clear, however, that in construing a Federal criminal statute, the courts go for help to the common-law authorities.[18]

§ 15. Theories of Criminal Jurisdiction. The basis of the common-law jurisdiction of crime was territorial. This jurisdiction extended not only to offenses committed within the territory by persons on the territory, and to offenses committed on board vessels of the country, but also to offenses committed within the territory by persons outside, as, for instance, where a shot was fired on one side of the boundary and took effect on the other. The punishment of piracy, however, has never been based on territorial jurisdiction, as its scene is usually the high seas, and it is considered the duty of every nation to suppress it. Continental nations have gone much further than common-law countries in the exercise of nonterritorial criminal jurisdiction. They not infrequently punish their citizens for crimes

[17] 7 Cranch 32. [18] 105 U. S. 611.

committed abroad, even though within the territory of civilized nations, and punish acts committed abroad against the safety of the state, whether committed by foreigners or citizens. A few countries have attempted to punish foreigners for crimes committed abroad against citizens of the country, although this doctrine has been attacked by the United States. No country has claimed jurisdiction of all offenses wherever and by whomsoever committed.[19]

§ 16. Territorial Jurisdiction. At the common law, if a man stands in one state, and shoots a man in a second state, who dies of his wounds in a third state, the second state has jurisdiction over the crime. The crime is considered to have been committed where the shot takes effect, and the locality of the crime within the jurisdiction is sufficient without the presence of the criminal there. The constitutional provision,[20] with regard to the interstate rendition of criminals, however, speaks of returning the person charged with crime on the demand of the executive of "the state from which he fled," and this has been taken to mean, that unless the person so charged has been in the state where the crime was committed, he is not subject to interstate rendition.

An analogous case to that of the man shooting across the boundary, is that of Lindsey v. State,[21] in which Lindsey, while in Missouri, had forged a deed to land in Ohio, and had sent it to a real estate agent in Ohio, through whom it was uttered and published by a sale of the land, in perfect good faith on the agent's part. The court held that Lindsey was guilty of uttering a false deed in Ohio. It said:

"The crime of uttering and publishing is not complete until the paper comes to the hands of some other person than the accused, and if it be sent by mail for the purpose of being there used, the crime is not committed until it is received by the person to whom it is to be delivered. It is a fundamental principle that a person is responsible,

[19] Art. II. Moore, Int. Law Digest 243.
[20] Art. IV, § 2, par. 2.
[21] 38 Ohio Stat. 507.

criminally for acts committed by his procurement as well as for those done in person. The inherent power of the state to punish the uttering and publishing of forged instruments within its territorial limits, without regard to the place where the forgery was committed, or the purpose was formed, is essential to the protection of her people. It is now a generally accepted principle that one who in one country or state employs an innocent agent in another to commit a crime, is liable in the latter country or state."

But as an original proposition it would not have been unreasonable for the state in which the man fired the shot, or in which the wounded man died, to have been given jurisdiction over the crime. In some states jurisdiction of this kind has been claimed by statute, and the courts have not considered these statutes unconstitutional because proceeding on other than common-law principles. Thus, in Commonwealth v. Macloon,[22] where the defendants had been convicted, under a statute, of the manslaughter of a man who died within the state in consequence of injuries inflicted by them upon him in a British merchant ship on the high seas, the court said:

"The existing statute clearly manifests the intention of the legislature to punish all who without legal justification cause the death of any person within the Commonwealth, wherever the first wrongful act is done, or of whatever country the wrongdoer is a citizen. The power of the Commonwealth to punish the causing of death within its jurisdiction is wholly independent of the power of the United States, or of the nation to which the vessel belongs, to punish the inflicting of the injury upon the high seas. And upon full consideration, the court is unanimously of the opinion that there is nothing in the Constitution or Laws of the United States, the Law of Nations, or the Constitution of the Commonwealth, to restrain the legislature from enacting such a statute."

And in People v. Botkin,[23] where the defendant had sent poisoned candy through the mail from California to one Elizabeth Dunning, in Delaware, and the latter had eaten

[22] 101 Mass. 1. [23] 132 Cal. 231.

thereof and died, the conviction, in California, was upheld under a statute providing for the punishment of "all persons, who commit, in whole or in part, any crime within this state."

Another case frequently arising at common law was that of the thief who had been taken with the stolen goods in his possession and was held for trial in a county where the original theft had not taken place. It was one of the rules of the common law that a man had a right to trial by a jury taken from the county where the alleged crime had been committed, but this was gotten around by the fiction of a continuing trespass, whereby the wrongful taking was considered to continue in every county into which the thief carried the goods. But this fiction was made use of in cases of this kind in England merely to get around the rule as to the place of trial. It was not extended to cases where the original theft was in a foreign country,[24] or in places where the common law did not apply, such as the Island of Jersey,[25] for it was felt that it would be an unallowable stretch of jurisdiction to try a man for an act committed where a different set of laws was in force.

In 1857 this question came before the courts of Massachusetts in the case of Commonwealth v. Holder,[26] where the defendant had stolen the goods in Rhode Island and taken them into Massachusetts where he was apprehended and tried. The majority of the court held that although Massachusetts was in much the same relation to Rhode Island that England was to the Island of Jersey, in that different sets of laws prevailed in the two states, yet that in earlier times it had not been unreasonable to regard the various colonies as in the relation to each other of English counties; that, accordingly, Massachusetts had so regarded them, at least in so far as this rule was concerned, and that this had remained the law of Massachusetts after the Revolution. A similar result was reached in Ohio, but in Stanley v. State,[27] the Supreme Court of the State refused

[24] Regina v. Carr, 15 Cox C. C. 131n.
[25] Rex v. Powers, 1 Moody C. C. 349.
[26] 9 Gray 7.
[27] 24 Ohio Stat. 166.

to extend the rule so as to punish a thief who had stolen goods in Canada and then brought them with him into the state. These cases probably represent the weight of authority at common law, although some states have followed the English practice more closely and refused to punish the thief coming from another state, although where this has been the case, the law has frequently been brought into line with the Massachusetts decision by statute. Statutes have even gone still further and claimed jurisdiction where the goods are brought from a foreign country, and there does not seem to be much question but that they are constitutional.

§ 17. Non-Territorial Jurisdiction. The right to punish citizens of a state for crimes committed abroad has sometimes been recognized,[28] but it has not been exercised except where the offense has been committed in barbarous lands, and is so opposed to common-law principles that it is not likely to be. But in the case of Hanks v. State,[29] the defendant was tried for the forgery of a transfer of a land certificate for land in the State of Texas, although all the acts constituting the forgery had been committed in Louisiana. Under the common law the Texas courts would not have had jurisdiction of the offense, but there was a Texas statute providing for the trial of just such cases, and the court held the statute constitutional on the ground that "when this forgery was committed in Louisiana, *eo instanti* (at that instant) a crime was committed against, and injury done to, the State of Texas, because it affected title to lands within her sovereignty."

[28] 2 Haywood 109.

[29] 13 Tex. App. 289.

CHAPTER II

THE CRIMINAL ACT

§ 18. Necessity of an Act. The common law punishes overt acts, and not intentions or beliefs, however wicked they may be. And although in Rex v. Sutton,[1] it was held that having in one's possession certain stamps capable of making an impression of part of one side of a coin, with the intention of making such an impression, was a common-law misdemeanor on the ground that "the having" might be considered an act, yet this was overruled in Rex v. Heath,[2] and in a later case,[3] it was said:

"The law will not take notice of an intent without an act. Possession is no such act. But procuring, with the intent to commit the misdemeanor, is the first step towards the committing of the misdemeanor."

But knowingly having in possession counterfeiting tools and the like is often made a crime by statute.

§ 19. Omission as an Act. It is hard to think of an omission as an act, and perhaps, rather than speak of acts of omission, it would be better to say that although as a rule the common law punishes only positive acts, yet it has come to regard certain wrongs as criminal which involve not positive action, but merely the non-performance of legal duty. Thus in the case of Regina v. Instan,[4] the defendant, an unmarried woman, aged thirty or forty years, had been living with, and in dependence on, her aunt, a woman of some seventy-three years of age. The latter, shortly before her death, suffered from gangrene in the leg which rendered her, during the last ten days of her life, unable to procure assistance, and yet the niece does not

[1] Hardwicke 370.
[2] Russ. & Ry. 184.
[3] Dugdale v. R. 1 El. & B. 435.
[4] 1 Q. B. 450, 1893.

appear to have given her any of the food supplied to the house by tradespeople, and certainly did not give or procure any medical or nursing attendance to or for her, or give notice to any neighbor of her condition or wants, although she had abundant opportunity and occasion to do so. The death of the aunt was substantially accelerated by this neglect, want of food, of nursing, and of medical attendance.

The niece was found guilty of manslaughter and the conviction was affirmed. Lord Coleridge said:

"There can be no question in this case that it was the clear duty of the prisoner to impart to the deceased, so much as was necessary to sustain life, of the food which she from time to time took in, and which was paid for by the deceased's own money for the purpose of the maintenance of herself and the prisoner; it was only through the instrumentality of the prisoner that the deceased could get the food. There was, therefore, a common-law duty imposed upon the prisoner which she did not discharge.

"Nor can there be any question that the failure of the prisoner to discharge her legal duty at least accelerated the death of the deceased, if it did not actually cause it. There is no case directly in point; but it would be a slur upon, and a discredit to, the administration of justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty toward her; that legal duty the prisoner has willfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty. It is unnecessary to say more than that, upon the evidence. this conviction was most properly arrived at."

The most familiar cases of criminal omission at the common law, however, are those where a parent or master fails in his duty to provide for the child or apprentice of tender years in his care, and causes its death; or where one under a legal duty to the public fails in his duty and death results. But the tendency is to regard all negligence by those who have entered upon an employment or undertak-

ing as misfeasance or active wrongdoing, rather than as non-feasance, even though the neglect in the particular case may have consisted of an omission.

Statute law, however, has gone much further than the common law in making the failure to provide, and generally, the non-performance of legal duty, criminal. In many cases, however, statutes have provided for the enforcement of legal duties by criminal process, where the end aimed at was not so much punishment as the performance of the duty, and where, despite the process, the non-performance of the duty was essentially a civil wrong rather than criminal. An instance of this is, the duties imposed on the old English counties, and the process by indictment provided for their non-performance.

§ 20. **Means of Commission.** In an old case, Lord Chief Justice Raymond said:

"There is no particular way of killing another that is necessary to constitute a murder; but the committing of murder is as various as the several ways of putting an end to human life." [5]

As we have seen, the crime may be committed through an innocent agent, as where a man was convicted for uttering a forged deed in Ohio through the instrumentality of an innocent agent there; and the innocent agent may be the person against whom the crime is directed, as where poisoned candy is sent through the mails and the innocent victim completes the crime himself by eating the candy. This was carried so far at the common law that it was held that the machinery of justice could itself be the innocent agent by which the crime was committed, and in the case of Rex v. McDaniel,[6] the defendants were convicted of murder for having maliciously caused one Joshua Kidden to be "unjustly apprehended, falsely accused, tried, convicted, and executed, well knowing him to be innocent of the fact laid to his charge, with an intent to share to themselves the reward," and although they were afterwards dis-

[5] Beale's Cases 292.

[6] Leach (4th ed.) 44.

charged, this was apparently from other than purely legal reasons.

Harsh or unkind treatment, not amounting to a threat of physical violence, although it may have "broken the heart" of the victim, will not make the wrongdoer a criminal. In some states, however, it has been held, that where one person puts another in reasonable apprehension of immediate physical injury, the wrongdoer is guilty of a criminal assault, even although the fright was the only injury received, and although from utter inability to carry out the threat and lack of intention on the part of the wrongdoer, the latter could not have been held for an attempt. But the authorities are divided on this point.[7] Where the reasonable apprehension immediately results in physical injury, the one causing the apprehension may be held criminally responsible for the result; but the general rule is that where such physical injury occurs at some subsequent time as a consequence of the fright, the connection between the original act and the final result is too remote to hold the wrongdoer for it, although there may be an exception to this when the one frightened and ultimately injured is a child of tender years.[8]

§ 21. Remoteness. It is conceivable that a man might be so frightened, because of letters threatening him with death, as to finally shoot himself, but the law would hold it to be his voluntary act, and would not consider the threatener guilty of the homicide. It would not be such a step as the law holds that a reasonable man would take. But in the case of Regina v. Pitts,[9] where the defendant was indicted for the murder of a man who had been found drowned, and it was uncertain whether the defendant had pushed him into the water, or he had thrown himself into the river to escape further violence, the court said:

"A man may throw himself into a river under such circumstances as render it not a voluntary act; by reason of

[7] See *infra*, § 81.

[8] R. v. Towers, 12 Cox C. C. 530.

[9] I C. & M. 284.

force applied either to the body or the mind. It becomes then the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well-grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was *no* other way of escape, but that it was such a step as a reasonable man might take. Here, all the circumstances show that, even if the deceased did throw himself into the river, it must have been from circumstances arising out of a scuffle with the prisoner or some other person, or from apprehension of further violence."

It is not always necessary that the wrongdoer should have been able as a reasonable man to foresee the consequences of his illegal act in order that he should be held liable for them. Thus in the case of State v. O'Brien,[10] the defendant had been convicted of manslaughter, and it was urged that but for the heart trouble with which the deceased had been afflicted the assault by the defendant would not have resulted in his death; but the court held that the ignorance of the physical condition of deceased on the part of the defendant would not excuse him from liability for the homicide. The chance of the poor physical condition of the other party was one which he took in making the assault.

A man may even be held criminally responsible for acts not necessarily illegal, but the natural consequences of which, under the circumstances of the case, will be to produce an unlawful act by other persons. Thus, in the case of Wise v. Dunning,[11] the defendant had been put under bonds to keep the peace because of certain violent attacks upon the Catholics which he had been making on the streets of Liverpool. Lord Alverstone said:

"Magistrates are only doing their duty when they have regard to, and make themselves acquainted with, the character of the population amongst whom they have to administer justice; and in considering the natural consequences of a man's acts who has used insulting language in the pub-

[10] 81 Iowa 88.

[11] 1 K. B. 167, 1902.

lic streets towards persons of a particular religion, the magistrates are bound to take into consideration the fact that there is a large body of those persons in the town."

But acts, otherwise perfectly lawful, do not *necessarily* become unlawful merely because they are almost certain to occasion unlawful acts on the part of others. Thus in Beatty v. Gillbanks,[12] it was held that it was not criminal for the Salvation Army to hold their street meetings, notwithstanding the fact that they were almost certain to be made the object of violent attacks by a so-called Skeleton Army.

A case not infrequently arising is one where a man is assaulted and dangerously wounded, but with proper medical treatment would recover from the wound. On this point the well-established rule of the common law would seem to be, that if the wound were a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation, rendered necessary by the condition of the wound.[13] But, subject to the above explanation, the wound must be the cause of death. If the wound be slight, and the surgeon be so negligent that the wounded man gets blood poisoning from improperly cared for surgical instruments, it is clear, that although without the wound the man would not have died, it is the surgeon who is responsible for the death, and not the one committing the assault. In such a case the wound may be the occasion of the death, but it is not its cause.

§ 22. Contributing Acts. Where a number of persons, in pursuance of a common design, commit a criminal act,

[12] 15 Cox C. C. 138.

[13] Commonwealth v. Hackett, 2 Allen 136.

each is responsible for the part played by the others. The act of each is the act of all. And the common design need not be a carefully hatched plot, but may be inferred from the spontaneous aid given to and received by another in a fight. But when there is no such common design, and a person receives successive wounds from persons acting independently of each other, and dies from one or more of the wounds, it is sometimes a difficult matter to fix the criminal responsibility for the homicide. It is clear that although the first wound may have been mortal, yet if the second wound were the sole cause of the death at the time it occurred, the giver of the first wound is not guilty of the homicide. Thus, if a man, while lying mortally wounded, is shot and killed by a person acting independently of the one who gave the first wound, the latter is not guilty of the homicide. But it would seem that if the first wound were mortal, and contributed to the death at the time it occurred both parties might be held for the homicide, even though without the second wound the death would have occurred somewhat later.[14] Where one of the wounds was the sole cause of death at the time it occurred, but it is impossible to say which person inflicted the wound, neither can be held for the homicide in the absence of common design.[15]

§ 23. **Preparation.** The statutory law makes some preparatory acts criminal in themselves; for instance, the procuring of tools for the purpose of counterfeiting, and of indecent pictures with intent to publish them, but aside from exceptional instances of this kind, the law does not consider as criminal the preparation for crime as distinguished from the attempt to commit crime. In the case of State v. Hurley,[16] it was shown that in pursuance of an arrangement with the accused, one Tracy had attempted to get a bundle of hack saws to the accused by throwing it to him as he sat behind the bars at an open window, and that the accused reached through the bars and got the bundle into his hands, but was ordered at that moment by the

[14] People v. Lewis, 124 Cal. 551.
[15] R. v. Davis, 15 Cox C. C. 174.
[16] 79 Vt. 28.

jailer to drop it and did so. He was charged with attempting to break open the jail, but the court said:

"The act in question here is the procuring by a prisoner of tools adapted to jail breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he has not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a prefatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design." The accused was accordingly discharged.

So, it has been held that a man in Alaska who wrote a letter to a firm of liquor dealers in San Francisco requesting them to ship one hundred gallons of whiskey to Alaska was not guilty of an attempt to introduce spirituous liquors there,[17] and that the making up of a false invoice at the place of exportation with intent to defraud the revenue was not an offense if not followed up by using it, or attempting to use it.[18]

§ 24. **Attempts.** An attempt to commit a crime is itself a crime. But an attempt means something more than a mere intent, and, as we have seen, something more than mere preparation. Just where to draw the line between an attempt and preparation on the one hand, and between an attempt and the completed crime on the other, is frequently a difficult matter. Thus, the case just given must have appealed to many at first blush as an attempt at jail-breaking; and the case of Rex v. Walsh,[19] where the defendant was charged with the larceny of a leather bag which he had succeeded in lifting from the bottom of the boot of a coach, but which he and his confederates were endeavor-

[17] U. S. v. Stephens, 8 Sawyer 116.
[18] U. S. v. Riddle, 5 Cranch 311.
[19] 1 Moody C. Cas. 14.

ing to pull out of the boot when he was arrested, will appear to many as a mere attempt to steal, and yet his conviction of the completed crime was affirmed. But the difficulty of drawing this line is evidently one that inheres in the subject. The line must be more or less an arbitrary one, and in each case resort must be had to closely analogous cases. In fact, the endeavor to lay down rules of easy application with regard to attempts is largely responsible for the undue artificiality of the law with regard to them, but such as they are, these rules must be considered.

§ 25. Proximity to the Completed Crime. There are certain acts which may not incorrectly be called attempts in a popular sense, but which are so far removed from the completed crime that few would think of them as criminal. Thus, in the stock case of a man shooting at a post, thinking the post to be an enemy, few would think of holding the man for an attempt to kill unless there were other circumstances to bring the shooting closer to the completed crime. Nor would a man be guilty of an attempt at illegal voting who had voted thinking he was under age, but who was, as a matter of fact, of full age. Nor would a man be guilty of an attempt to steal who took an umbrella with the intention of stealing it, which turned out to be his own. But there have probably been few prosecutions for acts of this kind, and perhaps the most that can be gathered from them is, that for an attempt to be criminal, the act alleged must approximate with considerable closeness to the completed crime.

§ 26. Not Necessarily the Last Step. For the act to constitute an attempt it need not be "the last proximate act to the consummation of the crime in contemplation".[20] Thus in the case just quoted from, the prisoner had taken the prosecutrix into a stable and had gone far towards the completion of a rape, but had voluntarily abandoned his purpose before the consummation of the crime, but the court held that the fact of abandonment did not prevent his acts from being a criminal attempt. It seems clear that

[20] Glover v. Commonwealth, 86 Va. 382.

if he had been stopped by a third party, the fact that he had not taken the last step before the completion of the crime would not have prevented his acts from constituting an attempt, and there appears to be no good reason why his voluntary abandonment should have changed the character of what he had already done.

§ 27. **Possibility of the Completed Crime.** From the hypothetical cases already given it has sometimes been held that there can be no attempt where the completed crime is impossible. And so in Regina v. Collins,[21] where the prisoner was indicted for attempting to pick a woman's pocket, and had gone so far as to get his hand into the pocket, but had been unsuccessful because there was nothing in the pocket, it was held that, as the completed act was impossible, there could be no attempt. But this decision shows the danger of generalizing from hypothetical cases, and has been overruled in England and has found little or no following in this country. A less objectionable generalization from those cases which has been advanced is that there is no criminal attempt where the act which it was intended to commit would not have been a crime if it had been consummated, as where a wife filches from her husband's pocket during the night.

A proper application of this principle would be the case of a foreigner coming to this country and attempting to do an act criminal in his own country, and which he thought criminal in this, but which, in fact, was not. Here the act in contemplation would not be a crime, nor would his belief that it was, make the attempt criminal. But in the case where a man took an umbrella which turned out to be his own, or the case where the man thought he was voting while under age, is it not entirely arbitrary to say that the act in contemplation was the taking of the umbrella before him, and not the taking of some one else's umbrella, or that the act in contemplation was the mere voting, and not the voting under age?

But this doctrine was applied in the late case of People

[21] 9 Cox C. C. 497.

v. Jaffe,[22] where the defendant was accused of attempting to receive stolen property, knowing it to have been stolen, but where the property had, in fact, lost its character as stolen property. The court said that the act in contemplation was the purchase of the goods which were brought to his place for sale; that, as under the circumstances of the case, this could not have amounted to a receiving of stolen goods, the attempt was not criminal. But, is it not fanciful to say that such was the act in contemplation, rather than the reception of stolen goods knowingly? The completed crime was impossible, but one may attempt the impossible, and it is objectionable to deny criminality to an attempt on that account, whatever guise the reasoning may take.

§ 28. **Present Ability.** But the doctrine that the act contemplated must be a crime has one advantage over the older theory that the completed crime must be possible of performance. It does not deny that a person may be guilty of a criminal attempt though himself lacking in capacity to perform the completed crime. It fixes its eye not upon the actor, but upon the thing or person acted upon. One application of the older theory was that if one were of an age when the law conclusively presumed him incapable of rape, he could not even be guilty of an attempt to commit rape, and in this particular class of cases this is still the general rule in this country. In some states this present ability is a requisite of all attempts, and the principle has even been embodied in statutes, but the better opinion would appear to be that of Mr. Justice Holmes in Commonwealth v. Kennedy,[23] where it was claimed that the fact that it had not been alleged that the dose of poison was large enough to kill was fatal to a conviction for attempt to poison. This was denied, and the court held that, at any rate in the case of an intended poisoning, the mere fact that the amount of poison was insufficient to kill would not prevent the act being a criminal attempt. Perhaps as helpful a generalization as can be made as to attempts was made by the learned Justice when he said:

[22] 185 N. Y. 497.

[23] 170 Mass. 18.

"As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it."

§ 29. Conspiracy. A conspiracy to commit a crime is, at the common law, in itself a crime, although no overt act be committed in pursuance of the conspiracy; but by statute some states require an overt act in specific cases. It is under conspiracy statutes that prosecutions of trusts and combinations in recent years have been conducted; also of labor leaders in conducting strikes unlawfully. So broad and indefinite is this crime in its definition, that public prosecutors have found an indictment for conspiracy the short and quickest method of securing evidence of overt criminal acts.

§ 30. Solicitation. A solicitation to commit a felony is in itself a crime, but not every solicitation to commit a misdemeanor is such. Thus, in Commonwealth v. Willard,[24] where the defendant was charged with inducing a man to sell liquor to him contrary to the statute, and the statute spoke only of selling, the court said:

"We know of no case where an act, which, previously to the statute, was lawful or indifferent, is prohibited under a small specific penalty, and where the soliciting or inducing another to do the act, by which he may incur the penalty, is held to be itself punishable. Such a case may, perhaps, arise, under peculiar circumstances, in which the principle of law, which in itself is a highly salutary one, will apply; but the courts are all of opinion that it does not apply to the case of one who, by purchasing liquor of an unlicensed person does, as far as that act extends, induce that other to sell in violation of the statute."

But it is clear that it is not only solicitations to felony that are criminal, and in Commonwealth v. Hutchinson,[25] where the defendant was charged with soliciting one to burn a store building, which was a misdemeanor, the court

[24] 22 Pick. 476.

[25] 6 Sup. Ct. (Pa.) 405.

touched on the artificial character of the distinction between felonies and misdemeanors, and said:

"Argument is scarcely needed to demonstrate that the solicitation charged in the present case is of a character to injuriously affect public society and the public peace and economy. Except solicitations to murder and riot, nothing is more calculated to disorder and terrorize society than incitements to incendiarism. Such incitement is a direct blow at security of property, and even of life. It must, therefore, be pronounced an indictable offense."

CHAPTER III

CRIMINAL INTENT

§ 31. The Guilty Mind. It is a principle of the common law that for an act to be criminal it must be done with a guilty mind. No such disgrace would attach itself to the criminal if it were not so. It is not enough that he should have caused injury to another. That may possibly make him liable to respond in damages, however careful and faultless he may have been, but in addition, there must be an element of guilt, concurring with the act, to make him a criminal. It is not sufficient that the wrongful act should have been done by a servant for his benefit, but without his knowledge, and that he should afterwards have ratified it. This would be sufficient to establish his civil liability, but as his guilt in ratifying the act would be subsequent to the act, the act and the guilty mind would not concur, and he would not be a criminal.

§ 32. Motive. But there may be a guilty mind, though the motive behind the act may seem to the individual, and even to history, of the best. Thus, many of the martyrs have suffered because they did acts which they knew to be contrary to the law. History has judged their motives to have been of the highest, yet they had done knowingly, what the criminal law had forbidden, and that in the eye of the law constitutes a guilty mind. The anarchist in killing a high official may not be moved by malice or spite towards the individual. His object may be to bring about a social millennium. In his mind's eye, perhaps, he is taking a place among the martyrs of history, but the law does not regard the motive—it knows not the principle that the end justifies the means—and it considers him to have had a guilty mind who has knowingly done an act forbidden by the criminal law.

Thus, in the case of Reynolds v. United States,[1] where the defendant, a Mormon of the Territory of Utah, was charged with violating the laws against polygamy, and it was urged in his defense that polygamy was, with him, a matter of religious duty, the court, by Chief Justice Waite, said:

"So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious beliefs? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

§ 33. Ignorance of the Law. The requirement of a guilty mind does not mean that the accused must have known the act to be contrary to the criminal law. If ignorance of the law were an excuse, then a wrongdoer might shield himself from punishment in many cases by his mere failure to learn it. And this principle has been applied even where it may seem to have worked a hardship. Thus, where a man who, at the time of the commission of the alleged crime, was on a ship upon the coast of Africa, and was convicted under a statute passed a month and a half before, news of which could not have reached him, the judges were of the opinion that he was guilty, but recommended that he be pardoned.[2] And in another case,[3] where a native of Bagdad was accused of committing a crime on board an East India ship lying in the docks at London, and it was urged that the alleged act was not a crime in his own country, and that he was ignorant that it was contrary to the law of England, the court held that this was no defense.

But a *bona fide* mistake as to some other branch of law than the criminal may have the effect of eliminating some

[1] 98 U. S. 145.

[2] R. v. Bailey, Russell & Ryan 1.

[3] R. v. Esop, 7 C. & P. 456.

necessary element of a specific crime, and thus prevent the act from being criminal. Thus, if a man takes personal property under a *bona fide* claim of right, he is not guilty of larceny, because, to be guilty of larceny, he must take it with the intention of depriving the owner of it. Here he takes it with no such intention. He has made a mistake with regard to the law of property, and thinks that what is another's is his own, but he is not pleading ignorance of the law of larceny; he is merely pleading that his mistake as to the law of property prevented his having that special kind of intent that the criminal law requires to be proved as a matter of fact in order that the act shall be considered a theft. If *A* recovered judgment against *B* for conversion of a horse, and went to *B's* stable and took the horse, there would be no criminal intent.

§ 34. Mistake of Fact. We have seen that knowingly doing an act contrary to the law is criminal, even though the doer was ignorant of the law and acting from what seemed to him the best of motives. But if the act, which he, as a reasonable man, honestly believes he is doing, is not criminal, and does not involve moral turpitude, he will not be held to have had the guilty mind if it turns out that he was mistaken as to the fact, and that the act was one, in fact, that if done knowingly, would have been criminal. Thus in Levett's Case,[4] the master and mistress of the house had gone to sleep, and about twelve o'clock at night their servant, having procured one Frances Freeman to help her with the housework, went to the door to let her out, when she thought she heard thieves trying to break in, and ran and called her master and mistress and told them so, meanwhile hiding Frances Freeman in the buttery so that they would not know of her presence. Levett and his wife came down, he with his sword drawn, and searched for the thieves. Discovering somebody in the buttery the wife cried out with great fear, "Here they be that would undo us," whereupon the husband rushed in and thrusting with his rapier in the dark, mortally wounded the said

[4] Croke Car. 538.

Frances. It was resolved by the court that he was not guilty of manslaughter.

This rule, that an honest mistake of fact excuses, is fundamental at the common law, and where a statutory crime must be done knowingly, intentionally, maliciously, etc., it is included in the statutory definition; but sometimes the statute does not expressly indicate that anything more than the doing of the forbidden act is necessary to constitute the crime; and in such cases it is a difficult question of statutory construction as to whether this principle of the guilty mind or mistake of fact is to be read into it. As we have seen,[5] the English and Massachusetts courts came to opposite conclusions on this point in construing similar statutes as to bigamy.

This question of statutory construction does not often arise in connection with the more important crimes, as it is ordinarily not left open by the language of the statute; but in the case of Regina v. Prince,[6] where the defendant was charged with having unlawfully taken an unmarried girl, being under the age of sixteen years, out of the possession of her father, the jury found that the girl had told the defendant she was eighteen, and that the defendant believed that statement and that such belief was reasonable, and so the court was compelled to decide whether this was any excuse under the statute. It was urged that the common-law doctrine of mistake of fact was implied in the word "unlawfully", but the majority of the court held that this simply meant "without legal cause", and that looking at the whole statute they thought the legislature meant in a case of this kind that the man would have to take the risk of the girl being below the statutory age.

On the other hand, this question frequently arises in connection with police legislation, such as statutes forbidding the sale of intoxicating liquors, where it is claimed that there was an honest belief that the liquor was not intoxicating; or statutes forbidding the sale of liquor to police officers while on duty, where it is claimed that there

[5] See *supra*, § 11.

[6] L. R. 2 C. C. 154.

was an honest belief that the officer was not on duty; or statutes forbidding the allowing of a minor to remain in a billiard parlor where it is claimed that there was an honest belief that the person was not a minor, and in these cases where the penalty is comparatively small and the effective enforcement of the statute would be so hampered by it, many of the courts have not read the necessity of the guilty mind into the statutes, and have held that an honest, reasonable mistake of fact does not excuse, but in this class of cases the authorities are pretty well divided.

§ 35. Presumption or Inference of Intent. Thus far we have seen that if a man does an act knowingly which is forbidden by the criminal law he does it with a guilty mind. He may be said to have done it with a criminal intent. But often the result may differ from the design. The result may not have been in his mind, and in that sense unintended, but that will not necessarily excuse him. Thus in State v. Smith,[7] where the defendant was charged with murder and it was urged that he had only intended some serious injury, the court said:

"The law will imply that the prisoner intended the natural and probable consequences of his own act; as in the case of shooting a gun into a crowd, the law will imply, from the wantonness of the act, that he intended to kill someone, although it might have been done in sport. If the prisoner's object had been nothing more than to make Carter's horse throw him, and he had used such means only as were appropriate to that end, then there would be some reason for applying to his case the distinction that where the intent was to commit only a trespass, or a misdemeanor, an accidental killing would be only manslaughter. But in this case the act done indicated an intention to kill; it was calculated to produce that effect, and no other; death was the probable consequence and did result from it; and I am of opinion there was no error in the charge of the Circuit Judge, that if the prisoner shot at Carter the crime was murder, although the prisoner may have designed only to do Carter some serious injury, as the falling from his horse."

[7] 2 Strobhart 77.

Ordinarily, the question whether the result was the natural and probable consequence of the act is one of fact for the jury, although in homicide cases courts are apt to decide this question for themselves when the character of the weapon leaves little chance for difference of opinion. When it has been determined that the result was the natural and probable consequence of the act, authorities differ as to whether the mental element with which the crime charged must be done, for instance, malice in murder, malicious intention in malicious mischief, and in some cases recklessness in manslaughter, is presumed as a matter of law, or is merely an inference which may be drawn by the jury.

§ 36. Transferred Intent. Where a man is doing something that is perfectly lawful, and exercising due care, and yet accidentally inflicts severe injury on his neighbor, the principle of the guilty mind forbids that he should be held a criminal therefor. But suppose that he intends a malicious assault on *A* and accidentally wounds *B*, can he be held for the malicious wounding of *B*? He did not knowingly wound *B* nor was it the natural and probable consequence of his intended assault on *A*, but the law transfers the malicious intention toward *A* to the actual though accidental wound given to *B*, and holds him guilty of maliciously wounding *B*. The same principle applies if a man intends unlawfully to shoot *A* and accidentally kills *B*. He is guilty of the murder of *B*. But in a case[8] where the defendant had thrown a rock at some persons with whom he had been fighting and accidentally broke a window, the court held that he was not guilty of maliciously breaking the window. The malicious intention toward the persons was a different kind of malicious intention from that meant in the statute relative to malicious injuries to property, under which the defendant was prosecuted, and it could not be transferred.

Very probably if he had maliciously intended to destroy other property and had accidentally broken the window, the defendant would have been found guilty. It must be

[8] Regina v. Pembliton, 12 Cox C. C. 607.

kept in mind, however, that this decision dealt with a statutory offense. The term "malicious" at common law was very broad, rather denoting that the act was done without lawful excuse than any specific intent, and it is doubtful whether many statutes will be interpreted as this one was. The broader the interpretation of the term "malicious" the greater is the possibility of transferred intent. In murder and manslaughter, where the guilty mind is of the most general character, the doctrine of transferred intent finds frequent application.[9]

§ 37. Specific Intents. As Mr. Justice Stephen has said:

"The mental elements of different crimes differ widely. *Mens rea* (guilty mind) means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter, it may mean forgetting to notice a signal." [10]

These different kinds of intent must be treated more at length under the specific crimes.

A large class of cases where the intent is especially specific is that of attempts, and their close neighbor, felonious assaults, such as assaults with intent to commit murder, to commit rape, etc. In these cases the intent has not been accomplished, as the intent to permanently deprive the owner of his property need not be in larceny, nor the intent to defraud in forgery, nor the intent to commit the felony in the mind of the burglar at the time he breaks and enters in burglary. In these cases the accused is not charged with the carrying out of the specific intent, but with some other act joined to this intention. It is clear that here, at any rate, the intent cannot be presumed from the act charged, but that it is an independent element which must be proved like any other fact.

[9] See *infra*, §§ 96, 97, 103. [10] Regina v. Tolson, 23 Q. B. Div. 168.

CHAPTER IV

CRIMINAL RESPONSIBILITY

INSANITY

§ 38. **Diseased Mind.** Where one does not act under the duress of a diseased mind or insane delusion, but from motives of anger, revenge, or other passion, he cannot claim to be shielded from punishment for crime on the ground of insanity. Insanity proper is more or less of a mental derangement, coexisting, often, it is true, with a disturbance of the emotions, affections, and other moral powers. A mere moral, or emotional insanity, so-called, unconnected with disease of the mind, or irresistible impulse resulting from mere moral obliquity, or wicked propensities and habits, is not recognized as a defense to crime in our courts.[1]

§ 39. **Right and Wrong Test.** But the mere fact that a man is suffering from a diseased, insane mind will not shelter him from criminal responsibility. His insanity may be partial and have had nothing to do with the crime. Or, he may be more or less imbecile, and yet not sufficiently weakminded to allow him to go unpunished. It is not sufficient to determine, then, that the accused was insane. The real question to determine is, whether the insanity had taken such a form, or reached such a stage, at the time of the act, as to relieve the accused from legal responsibility therefor. It is not sufficient to allow medical experts to testify merely as to the insanity, for insanity alone does not excuse.

There must be some further test of criminal responsibility, and the one most generally followed is the famous "right and wrong" test laid down by the English judges in their reply to the House of Lords in the debate growing

[1] Parsons v. State, 81 Ala. 577.

out of M'Naghten's Case.[2] It was their opinion "that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." Thus, if it were proved that the accused knew the act he was doing was contrary to the law of the land, or even if he did not know it was contrary to the law of the land, if it were so in fact, and he knew it was wrong, he would be punishable. This is the test applied in probably the greater number of the states.

§ 40. **"Irresistible Impulse" Test.** The "right and wrong" test proceeds on the theory that there can be no guilty mind where mental disease causes an inability to *distinguish* between right and wrong, but some states have gone further and said that there can be no guilty mind where such mental disease deprives one of his power to *choose* between right and wrong. And it is significant that we first find the doctrine that there must be a guilty mind stated in connection with cases of coercion. If the act was involuntary there could be no guilty mind. Chief Justice Shaw lays down this test in the case of Commonwealth v. Rogers,[3] where he says:

"If, then, it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be whether the disease existed to so high a degree that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it."

But although the "irresistible impulse" test is followed in a number of jurisdictions, it is the minority rule. Where it prevails, the "right and wrong" test is also used to the

[2] 10 Cl. & F. 200. [3] 7 Metc. 500.

extent that inability to distinguish between right and wrong will also excuse. A familiar instance of irresistible impulse is that in kleptomania, where the act is usually done with the knowledge that it is contrary to the law, but, it is claimed, under irresistible impulse. But most states have taken the view of Baron Bramwell in Regina v. Haynes,[4] that "if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it."

§ 41. **Delusions.** Often insanity takes the form of a delusion as to existing facts, and in this case it is everywhere the rule that the delusion will excuse to the same extent that the facts, with respect to which the delusion exists, would have excused, if real. Thus, if one commits homicide under the delusion that his life is about to be taken, he will be excused if the facts believed to have been true would have justified his killing in self-defense if they had been real. This is merely applying the rule that a mistake of fact excuses, to mistakes of fact resulting from insane delusions.

Where the insanity takes the form of an insane delusion as to fact, and an inability to distinguish between the right and wrong of action based on the supposed fact, this will excuse. Thus, a charge to the jury, that if the defendant believed there were witches, and that he had a right to kill them, and such belief was the product of a diseased brain, they should acquit him, was upheld by the United States Supreme Court.[5]

When the insanity takes the form of a delusion and an irresistible impulse based on that delusion, this will be a good defense in those states where the doctrine of "irresistible impulse" prevails generally.

INTOXICATION

§ 42. **No Excuse for Crime.** Voluntary intoxication is no excuse for crime. Thus, if a man while drunk, shoots

[4] 1 F. & F. 666.

[5] Hotema v. United States, 186 U. S. 413.

at another to scare him, but without an actual intention to take his life, and kills the other, he will be held for murder, notwithstanding the fact that he would never have done it if he had not been drunk. He is taken to intend the natural and probable consequences of his act just as if he had been fully sober. So, if a locomotive engineer, under the influence of drink, is so negligent that the natural and probable consequence of his act is someone's death, and death results, he will be held for manslaughter, although, when sober, none were more careful of human life than he. Likewise, where a man nerves himself to crime through drink, it is clear the drunkenness will not excuse his crime. In this case the drunkenness is even the instrument of crime.

But where a homicide is committed by accident or mischance, the one causing the homicide will not be held for manslaughter, even though the accident or mischance might never have occurred but for the drink. The mere fact of voluntary drunkenness will not supply the element of the guilty mind necessary to make the homicide criminal. Thus, in Regina v. Egan,[6] a mother, while in a more or less intoxicated condition, had overlain and suffocated her child, but the court held it to have been an unhappy mischance and insufficient to sustain a charge of manslaughter. And in the case of Regina v. Bruce,[7] where the prisoner, while very drunk, had been playing with a boy, and in consequence of the boy breaking away from him, had staggered into the street and knocked down a woman who happened to be passing, from the effect of which the woman died, the court held that the death of the woman was an accident, and that the defendant was not guilty of manslaughter.

§ 43. May Affect Specific Intent. In the cases just given of the drunken shooter and the drunken engineer, the law presumes that they intend the natural and probable consequences of their acts, and even though they may have been too drunk to foresee the consequences, their drunkenness

[6] 23 Vic. L. R. 159. [7] 2 Cox C. C. 262.

will be no excuse. But, as we have already seen,[8] there are certain crimes, such as felonious assaults, larceny, forgery, etc., where the specific intent charged, such as the intent to kill, or the intent to steal, or the intent to defraud, is not presumed, but must be proved as a matter of fact. In these cases, if the drunkenness is so extreme as to have rendered the accused incapable of the specific intent, the proof of the commission of the crime must fail.

Thus, in the case of State v. Johnson,[9] the prisoner was indicted for murder in the first degree. The court said:

"As the homicide was not perpetrated by means of poison, or lying in wait, or in committing or attempting to commit any of the crimes enumerated in the statute, he could only be convicted of the higher offense by showing that it was a willful, deliberate, and premeditated killing. A deliberate intent to take life is an essential element of that offense. The existence of such an intent must be shown as a fact.

"Implied malice is sufficient at common law to make the offense murder, and under our statute to make it murder in the second degree; but to constitute murder in the first degree, actual malice must be proved. Upon this question the state of the prisoner's mind is material. In behalf of the defense, insanity, intoxication, or any other fact which tends to prove that the prisoner was incapable of deliberation, was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less, and not the greater, offense was in fact committed."

§ 44. Provocation. In England drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the final act is to be attributed to the passion or anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober.[10] And

[8] See *supra*, § 38.

[9] 40 Conn. 136.

[10] Baron Parke in Rex v. Thomas, 7 C. & P. 817.

this ruling has had some following in this country. Its effect, however, in reducing what would otherwise be murder to manslaughter, has been the subject of severe criticism. In the case of Keenan v. Commonwealth,[11] the court said:

"Measured by this rule, the crimes of a proud, or captious, or habitually ill-natured man, or one who eats or fasts too much, or of one who is habitually quarrelsome, covetous, dishonest, or thievish, or who, by any sort of indulgence, fault, or vice, renders himself very easily excitable, or very subject to temptation, are much less criminal than those of a moderate, well-tempered and orderly citizen, because to the former a very small provocation or temptation becomes adequate to excuse or palliate any crime. If such were the rule, a defendant would be much more likely to injure than to benefit his case by showing a good character, and the law would present no inducement to men to try to rise to the standard of even ordinary social morality."

§ 45. **Delirium Tremens.** It was early laid down by Lord Hale that where continued indulgence in intoxicating drink had produced permanent mental disease or "fixed frenzy", the rules with regard to insanity would apply and not those with regard to drunkenness. Insanity brought on by long intemperance is not distinguished from other forms of insanity merely because it has its remote origin in the voluntary act of the victim. Thus, in United States v. Drew,[12] the accused was suffering from delirium tremens when he committed the homicide, and Justice Story said:

"Had the crime been committed while the defendant was in a fit of intoxication, he would have been liable to be convicted for murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty. The law looks to the immediate and not to the remote cause—to the actual state of the party, and not to the causes which remotely caused it."

But in a recent case,[13] the court said:

[11] 44 Pa. Stat. 55.

[12] 5 Mason (U. S.) 29.

[13] State v. Haab, 105 La. 230.

"We think it fairly appears from the recitals of the accused and those of the judge that the accused was in a state of intoxication at the time of the homicide, and that his mental condition at that time, whatever it might be, was the immediate and direct result, and not the remote result, of voluntary drunkenness. When we say immediate and direct result, we mean to say that it arose during a condition of drunkenness, and pending a single, continuing, voluntary, drunken debauch, which at its origin started with the accused in a condition of sanity. The results were, in a legal sense, immediate and direct results, though the beginning of the drunken debauch may have dated some days back, or even some weeks before the homicide."

§ 46. **Involuntary Intoxication.** The rule that drunkenness is no excuse for crime has always been confined to voluntary drunkenness. Thus Lord Hale did not apply it where the intoxication was without the fault of the victim, as where it was caused by drugs administered by an unskillful physician. But an irresistible impulse to drink does not make the drunkenness involuntary within the meaning of the rule.

COVERTURE

§ 47. **Coverture.** The limited responsibility of a married woman for crime is based, not on the lack of mental capacity, but on the quite general presumption that she is acting under the coercion of her husband, and that, therefore, the crime is not her voluntary act. The general rule is stated in Commonwealth v. Daley,[14] as follows:

"When a married woman is indicted for a crime, and it is contended in defense that she ought to be acquitted because she acted under the coercion of her husband, the question of fact to be determined is whether she really and in truth acted under such coercion, or whether she acted of her own free will and independently of any coercion or control by him. To aid in determining this question of fact, the law holds that there is a presumption of such coercion from his presence at the time of the commission of the crime; this presumption, however, is not conclusive and it

[14] 148 Mass. 11.

may be rebutted. And in order to raise this presumption it is also established that the husband's presence need not be at the very spot, or in the same room, but it is sufficient if he was near enough for her to be under his immediate influence or control."

But this presumption does not prevail in cases of treason and murder, and it is said in Hawkins Pleas of the Crown,[15] that

"A wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy-house; for this is an offense as to the government of the house, in which the wife has a principal share; and also such an offense as may generally be presumed to be managed by the intrigues of her sex."

INFANCY AND INCORPORATION

§ 48. Infancy. According to the common law, "where a child is under the age of seven years, the law presumes him to be incapable of committing a crime; after the age of fourteen he is presumed to be responsible for his actions as entirely as if he were forty; but between the ages of seven and fourteen, no presumption of law arises at all, and that which is termed a malicious intent—a guilty knowledge that he was doing wrong—must be proved by the evidence, and cannot be presumed from the mere commission of the act."[16] But there was a conclusive presumption that a boy under fourteen years was incapable of committing rape as a principal in the first degree. Statutory provisions in some states have raised the age for possible criminal responsibility to nine and ten years.

§ 49. Incorporation. It was once thought that a corporation, although it could be held criminally for an omission of duty, could not be criminally responsible for the positive wrongdoing of its agents, on the ground that it had no authority to do wrong, and that, therefore, the wrongful acts must be *ultra vires* (beyond its powers) and treated as the personal acts of the agents. This was an attitude

[15] Ch. 1, § 12. [16] Erle, Justice, in Regina v. Smith, 1 Cox C. C. 260.

similar to that taken by President Lincoln towards the states which attempted to secede. The acts directed against the United States were treated as the acts of the individuals holding the state offices, but not as the acts of the states themselves.

But as corporations became more numerous and important, it was seen that this attitude must be modified, and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities to individuals.[17] There are certain crimes, such as perjury, rape, murder, and similar offenses, which are so entirely without the scope of corporate purposes and powers, that even if ordered by the directors in order to accomplish some purpose deemed by them to be corporate, it is likely they would be deemed the individual acts of the directors, and not the acts of the corporation.

But what the directors do, "within the scope and purposes of the corporation, the corporation does. If they do any injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case."[18] Thus, corporations have been held for intentionally requiring laborers to work more than eight hours a day on public works of the United States, for committing nuisances and being in contempt of court, and their prosecution for rebating is familiar history. Of course corporations cannot be imprisoned, but they may be fined and their corporate life taken away.

[17] Com. v. Proprietors of New Bedford Bridge, 2 Gray 339.
[18] Quoted in U. S. v. John Kelso Co., 86 Fed. 340.

CHAPTER V

JUSTIFICATION AND EXCUSE

PUBLIC AUTHORITY

§ 50. Execution of Process. "The taking away of the life, therefore, of the malefactor according to law by sentence of the judge, and by the sheriff or other minister of justice, pursuant to such sentence, is not only an act of necessity, but of duty, not only excusable, but commendable, when the law requires it."[1] And the taking of life in the execution of lawful process may be justified because of the resistance offered by the one subjected to the process. In the case of the United States v. Rice,[2] the court said:

"An officer of the law who has legal process in his hands is bound to execute it according to the mandate of the writ. If he is resisted in the performance of this duty, he must overcome such resistance by the use of such force as may be necessary for him to execute his duty. If necessary, the law authorizes him to resort to extreme measures, and if the resisting party is killed in the struggle, the homicide is justifiable."

But if the one subjected to process attempts flight, even after arrest, instead of making resistance, the officer is not justified in shooting to kill unless the act charged is a felony. And even in the case of resistance to arrest, one court at least has held that the killing is not justified in the case of a misdemeanor, although the warrant may not otherwise be executed.[3] In any case, the officer does not have to abstain from performing his duty because his life will be endangered, and, in necessary self-defense, may kill.

"An officer is authorized to summon as many persons as may be necessary to assist him in the performance of his

[1] 1 Hale P. C. 496.
[2] Fed. Cas. No. 16,153.
[3] Stephens v. Commonwealth, 20 Ky. Law Rep. 544.

legal duties, and such persons are bound to obey such summons, and they are under the same protection afforded to officers, as they are for the time officers of the law.''[4]

Even without a warrant officers and private persons are under a duty to arrest offenders for crimes committed in their presence, and in the case of felonies officers have large powers of arrest, although the offense is not committed in their presence. In any of these cases where the arrest is authorized, the above principles as to the execution of legal process apply.

§ 51. Prevention of Crime. It was formerly the rule that one might shoot to kill where that was necessary to prevent the perpetration of a felony, and the rule was not unreasonable, when the penalty for practically all felonies was death. But although this statement is sometimes repeated today, the tendency of modern decisions is to limit the application of the rule to the more atrocious felonies, such as murder, robbery, housebreaking in the night time, rape, mayhem, or other felonies against the person, and not to extend it to felonies unaccompanied by force. Thus in Storey v. State,[5] the defendant was charged with murder for killing a man attempting to make way with the defendant's horse, and the court was requested to charge the jury, ''that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity for killing deceased in order to recover the property and prevent the consummation of the felony, the homicide would be justifiable;'' but this the court refused to do, and the Supreme Court upheld this refusal on the ground that larceny, at least committed as this had been in the daytime, was not so serious a felony as to justify killing.

DOMESTIC AUTHORITY

§ 52. Husband and Wife. Under the old ideas of the relation of husband and wife, the husband had, apparently, some right of corporal chastisement over the wife, but the following is now good general law:

[4] U. S. v. Rice, *supra.*

[5] 71 Ala. 329.

"We may assume that the old doctrine that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, the courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife, under any circumstances. But from motives of public policy, in order to preserve the sanctity of the domestic circle, the courts will not listen to trivial complaints. If no permanent injury has been inflicted, nor malice, cruelty, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." [6]

§ 53. **Parent and Child.** A parent may administer reasonable chastisement to a child, but the correction must not exceed the bounds of moderation either "in the measure of it or in the instrument made use of for that purpose." Thus, where a father, for some childish fault, took his little daughter, aged two years and six months, and gave her a number of strokes with a strap one inch wide and eighteen inches long, from which strokes she died, the jury found him guilty of manslaughter.[7]

§ 54. **Schoolmaster and Pupil.** Where this has not been changed by statute or school regulations, the schoolmaster has, within his own sphere, much the same powers of discipline as the parent. Courts are likely to be lenient with both the parent and the schoolmaster when no improper instrument has been used, although a reasonable man might have considered the punishment excessive, if the excess has been due to an honest mistake of judgment; but if the excess has been due to anger, or brutality, or vindictiveness, all the courts are agreed in holding them strictly to account.

SELF-DEFENSE

§ 55. **Reasonable Force.** The general rule is that a person who is assaulted may defend himself, opposing force to force, using as much force as is necessary for his own protection, and can be held only for exceeding such degree. But, at times, the apparent danger, and the apparent degree

[6] State v. Oliver, 70 N. C. 60.

[7] Regina v. Griffin, 11 Cox C. C. 402.

of force necessary for self-protection is greater than actually exists. Here the doctrine, that a reasonable *bona fide* mistake of fact excuses, comes into play. Thus in Shorter v. People,[8] the court said:

"When one who is without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was *in fact* neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true."

§ 56. Retreat to the Wall. But the law is very jealous of the taking of human life, even in self-defense, and some of the courts have denied the right of the assailed to stand his ground and use such force as is necessary to repel the attack, where the latter would necessitate the killing of the assailant, and the assailed could with reasonable safety retreat. Thus in Commonwealth v. Drum,[9] the court said:

"The right to stand in self-defense without fleeing has been strongly asserted by the defense. It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this freedom our liberties would be worthless.

"But the law does not apply this right to homicide. The question here does not involve the right of mere ordinary defense, or the right to stand wherever he may rightfully be, but it concerns the right of one man to take the life of another. Ordinary defense and the killing of another evidently stand upon different footings. When it comes to a

[8] 2 Comstock 193. [9] 58 Pa. 9.

question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die."

But in a late Minnesota case,[10] the court said:

"The doctrine of 'retreat to the wall' had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use, and to the type, of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men armed with repeating rifles face each other in an open space, removed from shelter, with intent to kill or do great bodily harm What might be a reasonable chance for escape in the one situation might in the other be certain death."

And a number of western states refuse to apply the doctrine of the necessity of the "retreat to the wall" at all, where the one pleading self-defense to a charge of homicide has not been the aggressor, or mixed up in a brawl with the deceased. None of the courts apply the doctrine where the man has been attacked in his home.

When the one pleading self-defense to a charge of homicide has been the aggressor, or been mixed up in a brawl with the deceased, all the courts agree that he must have withdrawn from the combat and "retreated to the wall" or his defense will not be good. But he may have withdrawn from the *combat* although his adversary may not have withdrawn from the *pursuit.* Thus, in Stoffer v. State,[11] the defendant had been the original aggressor, but had declined further combat, and had retreated rapidly a distance of one hundred and fifty feet and taken refuge in the house of a stranger, where he had shut and held the door. This had been forcibly opened by his adversary and two others, whereupon they assaulted him and the killing ensued. The court said:

[10] State v. Gardner, 96 Minn. 318. [11] 15 Ohio Stat. 47.

"A line of distinction must be somewhere drawn, which, leaving the originator of a combat to the necessary consequences of his illegal and malicious conduct, shall neither impose upon him punishments, or disabilities unknown to the law, nor encourage his adversary to wreak vengeance upon him, rather than resort to the legal tribunals for redress; and we think, upon principle and the decided weight of authority, it lies precisely where we have already indicated. While he remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such case, it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct.

"But when he has succeeded in wholly withdrawing himself from the contest, and that so palpably as, at the same time, to manifest his own good faith and to remove any just apprehension from his adversary, he is again remitted to his right of self-defense, and may make it effectual by opposing force to force, and, when all other means have failed, may legally act upon the instinct of self-preservation, and save his own life by sacrificing the life of one who persists in endangering it."

But "knowledge of the withdrawal of the assailant in good faith from the combat must be brought home to the assailed."[12] And so, where the original assailant had so injured his antagonist that the latter was unable to comprehend that the other had withdrawn from the fight, and continued to follow him to his own death, it was held that the defendant had brought the necessity of killing on himself and was not excusable.[13]

§ 57. Anticipated Attack. A man will be excusable if he goes where he has a right to go although he may have anticipated an attack and gone armed because of it. Thus in State v. Evans,[14] the defendant had informed a tenant of his wife that he must leave the premises at the end of the term, whereupon the latter made threats against the defendant which resulted in the tenants being bound over to keep the peace. This so enraged the tenant that he

[12] People v. Button, 106 Cal. 628. [13] *Id.* [14] 124 Mo. 397.

threatened to take the defendant's life. The latter armed himself, and shortly afterwards went upon the rented premises to see to the division of the crop. The court said:

"The fact that the defendant expected an attack did not abate by one jot or tittle his right to arm himself in his own proper defense, nor to go where he would, after thus arming himself, so long as he did no overt act or made no hostile demonstration towards Fine. Defendant was where he had a right to be; the land belonged to his wife; he had a right to see that proper division was made of the crop, and to oversee such division. If the mere expectation of an assault from an adversary is to deprive the expectant of the right of self-defense, merely because he goes armed in the vicinity of his enemy, or goes out prepared upon the highway where he is likely at any moment to meet him, then he has armed himself in vain, and self-defense ceases wherever expectation begins."

DEFENSE OF DWELLING AND PROPERTY

§ 58. Defense of Dwelling. The protection thrown by the law around a man's dwelling is an extension of the protection thrown around his person. If the attack on his dwelling causes a reasonable apprehension of great bodily harm to the inmates thereof, he is entitled to resist that attack at the threshold, and, if necessary, kill the attacking party. A burglary may fairly be said to cause reasonable apprehension of great bodily harm, and the inmate of the house may act upon appearances, and does not act at his peril in case those appearances turn out to be false.

But, that a man's house is his castle does not mean that he can resist every entrance to his house to the death, where the entrance cannot otherwise be prevented. Thus, in the case of unlawful service of process, the killing certainly cannot be justified where the entrance to the house could have been prevented by less extreme means, and even in such a case if the entrance is forcible and cannot otherwise be prevented, the law considers that the wrong should be submitted to, rather than life taken. Such a state of

facts, however, may be sufficient provocation to reduce the crime from murder to manslaughter.

Only so much force is allowable in repelling a trespass as is necessary to accomplish that object, and it has been held that "a kick is not a justifiable mode of turning a man out of your house, though he be a trespasser."[15] And in another case,[16] the court said:

"When a trespasser or unwelcome visitor invades the premises of another, the latter has the right to remove him, and the law requires that he should first request him to leave, and, if he does not do so, that he should lay his hands gently upon him; and, if he resists, he may use sufficient force to remove him, taking care, however, to use no more force than is necessary to accomplish that object."

In this case the intruder had been standing at the door of the defendant's house "reaching in the door and cutting with a razor," while the defendant was striking at him with a whipstaff, and the court held that the jury would have been warranted in finding that it was the purpose of the defendant to expel him from the house, and that in such case it was for them to determine whether more force had been used than was necessary.

§ 59. **Defense of Property.** What has just been said with regard to trespassers to dwellings applies equally to trespassers to property in general, for where the wrong to the dwelling does not create a reasonable apprehension of great bodily harm to the inmates, the dwelling is not to be distinguished from other forms of property.

§ 60. **Recaption of Property.** When property is wrongfully taken from a man he may "regain his momentarily interrupted possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon."[17] And "it has been held that, even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to

[15] Wild's Case, 2 Lewin 214.
[16] State v. Taylor, 82 N. C. 554.
[17] Commonwealth v. Donahue, 148 Mass. 529.

regain possession by reasonable force, after demand upon the third person in possession." [18]

COERCION

§ 61. Compulsion. The principle is far reaching in the criminal law that a man is not liable except for his voluntary acts, and we have seen that the wife's responsibility for crime is materially lessened by the general presumption that acts done in the husband's presence are done under his coercion.[19] "But the impelling danger should be present, immanent, and impending, and not to be avoided."[20] And even then it may not be a sufficient excuse. Thus, in *Res Publica* v. McCarty,[21] where the defendant was charged with high treason for joining the armies of the King of Great Britain, the court instructed the jury that "in the eye of the law, nothing will excuse the act of joining an enemy but the fear of immediate death—not the fear of any inferior personal injury, nor the apprehension of an outrage upon property. But, had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period."

And it is generally considered that threats of immediate death will not justify taking the life of an innocent third party. In such a case the person threatened is justified in taking the life of those threatening him rather than that of the innocent man.[22]

§ 62. Obedience to Orders. The mere command of another, such as a parent, or master, or superior police officer, will not relieve one of responsibility for crime, but where one is a subordinate in an organization like the army where strict discipline prevails, he may be placed in a very delicate situation. To disobey an order may subject him to military discipline, to obey it, may subject him to the

[18] See *supra*, footnote 17.
[19] See *supra*, § 48.
[20] Bain v. State, 67 Miss. 557.
[21] 2 Dall. 86.
[22] Arp v. State, 97 Ala. 5.

criminal law of the land. The law on this point is well laid down in the case of Riggs v. State,[23] where the defendant had been found guilty of the murder of one Captain Thornhill, although the killing had been done under the orders of his superiors. The court said:

"A soldier in the service of the United States is bound to obey all lawful orders of his superior officers, or officers over him, and all he may do in obeying such lawful orders constitutes no offense as to him.

"But an order, illegal in itself, and not justified by the rules and usages of war, or in its substance being clearly illegal, would afford a private no protection for a crime committed under such order, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same a crime in law. Any order given by an officer to his private, which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him. No person in the military service has any right to commit a crime in law, contrary to the rules and usages of war, and outside of the purposes thereof; and the officers are all amenable for all crimes thus committed, and the privates likewise are answerable to the law for crimes committed in obeying all orders, illegal on their face and in their substance, when such illegality appears at once to a common mind on hearing them read or given."

And the same principle was applied where a member of a military guard on a United States military reservation was ordered to shoot a soldier who had committed a military offense and was endeavoring to escape.[24]

NECESSITY

§ 63. Inevitable Necessity. When a man's hand is seized by a person of such superior strength as to be irresistible, and is used against his will, to strike a blow, it is clear that not only is the act not his voluntary act, but that it cannot be properly termed his act at all. It is to be distinguished from the cases referred to in the preceding

[23] 3 Cold. 85.

[24] U. S. v. Clark, 31 Fed. Rep. 710.

section, where, although the acts were done under duress, there was a chance between submission to the threat and the commission of the act. The non-liability for the crime is even clearer in this case than the other. The one whose arm is seized is no more guilty of the crime than is a pistol with which a man is shot. Thus in the case of the Brig William Gray,[25] where the vessel had touched at one of the West Indies contrary to the Embargo Act, it was claimed that she had been driven out of her course by storms, tempests, stress of weather, and necessity, and this was held a sufficient excuse, while the fact that the driver of a wagon in another case,[26] was caught in a block and thus compelled to suffer the vehicle to stop in the street, was held to take the case out of the municipal ordinance penalizing any one for suffering his vehicle to stop more than twenty minutes in the streets.

§ 64. **Extreme Need.** Lord Bacon was of the opinion that if a man stole food to satisfy his present hunger, he was not guilty of larceny, but Lord Hale denied that such was the law of England, and held that if a person, being under necessity for want of victuals or clothes, should take them, it would be felony, and such has been deemed to be the law since. In the case of the United States v. Holmes,[27] Baldwin, J., charged the jury that in case a ship was in no danger of sinking, but all sustenance was exhausted, and a sacrifice of one person was necessary to appease the hunger of the others, the selection should be by lot; but it is doubtful whether even in such a case the killing would be excusable, and the remark was not required by the facts of the case. The actual decision was that, even in dire need, the crew had no right to throw passengers overboard to save the boat from sinking, as their own safety was secondary to the duty they owed the passengers.

In the case of Regina v. Dudley,[28] two men and a boy were cast away on the high seas sixteen hundred miles from land and compelled to put out in an open boat. After drift-

[25] 1 Paine 16.
[26] Commonwealth v. Brooks, 99 Mass 434.
[27] 1 Wall. Jun. 1, 22.
[28] 15 Cox C. C. 624.

ing eight days without food and six days without water, the men killed the boy and fed upon his body four days, when they were picked up by a passing vessel. It was found that if the men had not done this they would probably have died of famine, and that the boy, being in a much weaker condition, would likely have died before them. Notwithstanding this the court held them guilty of murder. It said:

"To preserve one's life is, generally speaking, a duty; but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty, not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead,* these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others.

"It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what means is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be, No."

CUSTOM

§ 65. Custom. While a custom may supplement the law and thus affect the rights of parties acting with knowledge of it, and although it may even yet, as has been the case especially in the remote past, ripen into law, yet if it is contrary to the law it is invalid and is no excuse for crime. However lenient the jury may be, the law does not hold a man less guilty because the crime has become so common that the community may have become callous to it.

In the case of Regina v. Reed,[29] it appeared that the defendants had been bathing near a public footway where,

[29] 12 Cox C. C. 1.

for more than half a century bathing had taken place without any complaint, and that there had not been on the part of the defendants any exposure beyond what was necessarily incident to the bathing itself, to the undressing on the land side of the path, and passing naked to and from the sea across the path. The pathway was one of the most pleasant walks in the neighborhood and frequented by women except in the bathing season. The court said that

"It was impossible to set up a customary right to bathe close to the path in such a way as to violate public decency, and thus to be inconsistent with the use of the footway by any of the Queen's subjects, especially of the female sex. No one could suppose that respectable women could frequent the foot path where men were in the habit of bathing, and were constantly seen in a state of nudity. It was clear, therefore, that the usage so to bathe, however long it might have existed, could not be upheld, and that those persons who thus exposed themselves upon or near to a public footway were liable to be indicted for indecency."

CHAPTER VI

PARTIES IN CRIME

COMBINATIONS IN CRIME

§ 66. Common Design. It is clear that where two or more unite to commit a crime, each is liable for acts coming within the common purpose, and if some further crime is the natural and probable consequence of the one intended, and actually results from carrying it out, each is liable for such crime. And it is generally held where the common purpose is to commit the more serious felonies, such as burglary and arson and robbery, and homicide results from the carrying out of the common purpose, even though it could not have been foreseen as the natural and probable consequence thereof, that all those engaged in the common purpose will be guilty of murder. And where the common purpose, say, to rob, is not directed towards any one person, but is general, those participating in the general purpose, though not present, nor cognizant of the particular robbery, will be held for it.

But where the common purpose is to rob *A,* those not present and abetting will not be liable if the rest rob *B;* where the common purpose is to burn a house, those not present and abetting will not be liable if the rest commit larceny. And if the common purpose is to commit robbery, those not present and abetting will not be liable for a murder not resulting from the robbery, nor committed in pursuance of it, but growing out of the particular malice of individuals.

It is often a difficult matter to determine whether the crime carried out is a different one from that advised, or the same one carried out in a different manner. Thus in Thornton v. State,[1] the defendant had loaned the one who

[1] 19 Ga. 437.

had done the killing a pistol, and told or advised him to kill one Gordon with it if the latter should again rob him at cards. "His advice or instruction to kill Gordon was, therefore, conditional, and dependant upon the event that Gordon should again rob Amos at cards." There was nothing in the evidence to show that later Gordon had robbed Amos at cards, or that the shooting had resulted from it, and the court held that the act did not come within the common purpose. But this decision must be doubted.

In the famous case growing out of the Haymarket riots[2] in Chicago, certain revolutionary organizations had agreed, among other things, to throw bombs into the various police stations and to shoot the policemen as they came out. The following evening a public meeting was held at the Haymarket and incendiary speeches made by various of the defendants. As the closing speech was being made several companies of policemen marched from the neighboring police station to disperse the crowd, when one of the bombs prepared by the revolutionary organization was thrown into their midst, and shots fired into their ranks by members of the armed sections. Seven policemen were killed and sixty more were seriously wounded. It was conceded that no one of the convicted defendants had thrown the bomb with his own hands, but it was held that the mode of attack as made corresponded sufficiently with the mode of attack as planned to make all those participating in the latter responsible for the murder.

"The general resolution of the confederates need not be proved by direct evidence. It may be inferred from circumstances; by the number, aims, and behavior of the parties at, or before, the scene of action."[3] Nor, indeed, need the common purpose find any very definite mode of expression in the minds of those participating in it. Thus the common design of the mob may be of the most general character. And in Regina v. Swindall,[4] where the prisoners had been in company and had raced furiously along the road,

[2] Spies v. People, 122 Ill. 1.
[3] Ruloff v. People, 45 N. Y. 213.
[4] 2 C. & K. 230.

and it was uncertain which had run over and killed an old man, it was held that both were guilty of manslaughter. Again the common design may result from aid voluntarily given and received in a fight. But if the aid is not accepted and wished for, the one on whom it is forced may not be responsible for its consequences.[5] Those concerned in the common design need not be what would ordinarily be thought of as coconspirators. They may bear the relation to each other of principal and agent.

But the law leaves open the door for repentance. This cannot wipe out what has already been done, but it may relieve from responsibility for further acts done by others in pursuance of the old design. Thus in State v. Allen,[6] where the defendant was charged with a homicide committed in an attempt to escape from the State prison, it was urged that he had abandoned the attempt before the fatal shot was fired. The court said:

"Until the fatal shot there was *locus penitentiæ* (place of repentance). To avail himself of it Allen must indeed have informed Hamlin of his change of purpose, but such information might be by words or acts; and if with the intention of notifying Hamlin of his withdrawal from the conspiracy he did acts which should have been effectual for that purpose, but which did not produce upon the mind of Hamlin the effect which he intended, and which they naturally should have produced, such acts were proper for the jury to consider in determining the relation of Allen to the crime which was afterwards committed."

§ 67. Principal and Agent. The common law sometimes holds a principal civilly responsible for acts of those in his employ where it does not hold him criminally responsible. The civil responsibility is based somewhat upon the idea that the business should stand the loss; the criminal responsibility is based on the idea of personal guilt. And even where the principal has ratified the act he is not liable because his guilty intent did not exist at the time of the act.[7] But where negligence is sufficient to satisfy the

[5] People v. Elder, 100 Mich. 515. [6] 47 Conn. 121.

requirement of the guilty mind, as, for instance, in manslaughter, the negligence of the principal in choosing his servant or in giving him instructions may make him criminally responsible for an act of which the agent was the immediate cause. In such a case it is for the consequences of his own negligence in choosing the servant, or in giving instructions, that he is held. And where a principal was prosecuted for the sale of liquor made to a minor by a bartender, the court required the jury to be "satisfied that the master sincerely and honestly intended that his instructions should be obeyed in good faith, and that he was not negligent or careless in the selection of his clerks, or in the regulations and precautions which he prescribed for their guidance."[8] Statutes, however, frequently hold principals to fully as strict a criminal as civil liability where the unlawful sale of liquor or other like offense is involved, even when the principal may have forbidden the sale.

The agent may be an innocent one.[9] "Crimes may be perpetrated through the instrumentality of living agents in the absence of the principal, and our law books are full of such cases. Where poison is knowingly sent to be administered as medicine by attendants who are ignorant that it is poison, and death ensues, the person who thus procures the poison to be taken is guilty of murder. So, where a child without discretion, an idiot, or a madman, is induced by a third person to do a felonious act, the instigator alone is guilty, and although not present at the perpetration of the crime, he is a principal felon."[10] In such a case there is properly no "combination in crime" as in the case of the responsible agent. In the latter case both are parties to the crime, and the principal is ordinarily an accessory before the fact. In the case of the innocent agent, the principal is the sole criminal.

As we have seen,[11] the command of another to do an unlawful act does not excuse one unless it is accompanied

[7] See *supra*, § 32.

[8] Commonwealth v. Stevens, 155 Mass. 291.

[9] See *supra*, § 21.

[10] People v. Adams, 3 Denio 190.

[11] See *supra*, § 63.

by coercion, although this coercion is presumed in most cases where the wife commits a crime in the presence of her husband.[12]

§ 68. Statutory Crime. Ordinarily, one who solicits the doing of a crime is a party to that crime, but we have seen,[13] that where a statute punished the selling of liquor, it was held that this was directed at the seller alone, although there could not have been a seller without a buyer. A similar result was reached in Regina v. Tyrrell,[14] where the defendant, a girl, was charged with aiding and abetting one Ford in the commission of the misdemeanor of having unlawful carnal knowledge of her while she was between the ages of thirteen and sixteen, against the form of the statute, etc. The court quashed the conviction. Lord Coleridge said:

"It it impossible to say that the Act, which is absolutely silent about aiding or abetting, or soliciting or inciting, can have intended that the girls for whose protection it was passed should be punishable under it for the offenses committed upon themselves."

PRINCIPALS

§ 69. Principals in the First Degree. Parties in crime are either principals or accessories. To be a principal one must commit, or assist in the commission of, the criminal act. This leaves those who participate in the common purpose, but merely by way of advice, instigation, or command, as accessories.[15] Principals are divided into principals of the first and second degree. The distinction is one which was formerly much more important than it is today, as it has been abolished in many states by statute. Still it requires some notice. Those who actually commit the crime are principals in the first degree; those present who assist in its commission are principals in the second degree. Thus, the man who fires the shot in a case of homicide is a principal in the first degree. His friend, who stands

[12] See *supra*, § 48.
[13] See *supra*, § 31.
[14] 1 Q. B. 710 (1894).
[15] See *infra*, § 73.

by his side and prevents a third party from interfering with the shooting, is a principal in the second degree. It is not necessary that the principal in the first degree should himself complete the crime.

Thus, one burglar might break open a house, and the other burglar make the entry. They would both be principals in the first degree, at least if both acts were done at practically the same time. So, too, where one party printed a forged bank note, a second impressed the date line and number, and a third added a signature, it was held that they were all principals in the first degree as each had aided in completing some part of the forgery, even though the one who had done the printing was not present when the forgery was completed.[16]

§ 70. Principals in the Second Degree. Principals in the second degree are those present, aiding and abetting the commission of the crime. This presence may, however, be a constructive presence. It need not involve being within sight or sound of the place where the crime is committed. Thus, in Commonwealth v. Knapp,[17] where the evidence had tended to show that the principal felon had entered the house and perpetrated the murder while the defendant was in a street about three hundred feet distant, the court said:

"The person charged as principal in the second degree must be present, and he must be aiding and abetting the murder. But if the abettor, at the time of the commission of the murder, were assenting to the murder, and in a situation where he might render some aid to the perpetrator, ready to give it if necessary, according to an appointment or agreement with him for that purpose, he would, in the judgment of the law, be present and aiding in the commission of the crime. It must, therefore, be proved that the abettor was in a situation in which he might render his assistance in some manner to the commission of the offense."

And where one of the confederates had lured the owner of the store to a party about a mile distant, while the

[16] Rex v. Bingley, R. & R. 446. [17] 9 Pick. 496.

others were breaking into the store, it was held that he was giving assistance and was constructively present.[18]

What is meant by "aiding and abetting" was discussed in the case of Regina v. Coney.[19] It appeared in that case that professional prize fighters had engaged in a fight near a certain road, and that the defendants had been onlookers. In the trial court the jury had been directed that "if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything." This the higher court held to be erroneous. It said:

"Now it is a general rule in the case of principals in the second degree that there must be participation in the act, and that although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavor to prevent the felony, or apprehend the felon."

The court further held that mere presence unexplained might be evidence of encouragement, and so, of guilt, but that it was not conclusive proof thereof.

ACCESSORIES

§ 71. In What Crimes There Are Accessories. The distinction between principals and accessories exists only with regard to felonies. Lord Coke says:

"In the highest offense and lowest injury, there are no accessories, but all are principals; as in treason, petit larceny, and trespass. And the law has been settled for nearly two hundred years that in petit larceny there can be no accessory, on account of the smallness of the felony. Those who procure aid or advise, in the commission of the offense, are principals. And those who merely assisted the escape of the perpetrator of the offense were not, at common law, regarded as criminal." [20]

§ 72. Accessories Before the Fact. At the common law

[18] Breese v. State, 12 Ohio Stat. 146.
[19] 8 Q. B. Div. 534.
[20] Ward v. People, 6 Hill 144.

an accessory could not be put on trial without his consent before his principal. The reason of this was that, if there were no principal, there could be no accessory, and the law presumed no one guilty before conviction. Thus, if the principal were dead, an accessory could not be convicted. But in a statute of the time of Anne, which made the receiver of stolen goods an accessory, it was provided that if the principal was not amenable to the process of the law, then the accessory might be indicted, and many statutes today either provide that the accessory may be indicted and convicted whether the principal felon has or has not been convicted, or go even further with accessories before the fact, and make them principals.

§ 73. **Accessories After the Fact.** An accessory after the fact is one who receives, relieves, comforts, or assists a felon, knowing him to be a felon, with the intention of shielding him from the law. At the common law, a wife could not be an accessory after the fact.

"As to the receiving, relieving, and assisting one known to be a felon, it may be said in general terms, that any assistance given to one known to be a felon in order to hinder his apprehension, trial, or punishment, is sufficient to make a man accessory after the fact; as, that he concealed him in the house, or shut the door against his pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse, or other necessaries, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape; or conveyed instruments to him to enable him to break prison and escape. . . . But merely suffering the principal to escape will not make the party accessory after the fact; for it amounts, at most, to a mere omission.[21] Or if he agree for money not to prosecute the felon; or if, knowing of a felony, fails to make it known to the proper authorities; none of these acts would be sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding of a felony, or the misprision of it, the doer will not be an accessory." [22]

[21] 1 Hale 619, 9 H. IV. 1. [22] Wren v. Commonwealth, 26 Grat. 952.

EXAMINATION PAPER

CRIMINAL LAW

PART I

Read Carefully: Place your name and full address at the head of the paper. Any cheap, light paper like the sample previously sent you may be used. Do not crowd your work, but arrange it neatly and legibly. *Do not copy the answers from the Instruction Paper; use your own words, so that we may be sure you understand the subject.*

1. Are all acts, which are punishable by the state, crimes?
2. Distinguish a crime from a tort.
3. Is consent ever a defense to a crime? If so, when?
4. Is contributory negligence ever a defense to a crime? If so, when?
5. Distinguish a misdemeanor from a felony.
6. When is the distinction between *malum in se* and *malum prohibitum* important in criminal law?
7. What acts are crimes in the federal courts?
8. What state has jurisdiction of the crime in a case where *A* shoots *B*, each standing in different states, and *B* dies in a third state?
9. Is intent without an act ever a crime? Discuss.
10. In what cases is an omission an act?
11. *A* becomes frightened and throws himself into a river to escape further violence from *B*. *A* drowns, is *B* guilty of murder?
12. Several parties contribute to the commitment of a crime, but only one does the final act. To what extent are the others criminals?
13. In what cases is an attempt to commit a crime itself a crime?
14. Define *conspiracy*.
15. When, if ever, are ignorance of the law and mistake of fact defenses to a crime?
16. *A* intends a malicious assault on *B* and accidentally wounds *C*, can he be held for malicious wounding of *C*?

17. What is meant by specific intent in criminal law?

18. Name and define the several tests of insanity.

19. Is intoxication ever an excuse for a crime? Explain.

20. What was the liability of married women for crimes at common law?

21. State the liability of an infant for his crimes.

22. Is an officer of the law ever justified in killing when making an arrest or resisting an escape? If so, when?

23. What is the doctrine of "Retreat to the Wall", and to what extent is it generally considered the law today?

24. To what extent is one justified in the defense of his dwelling?

25. To what extent may force be used in the recapture of property?

26. Is the killing of one of a party ever justified in order to preserve the lives of the remainder? Justify your answer.

27. Is custom ever an excuse for a crime? Explain.

28. *A*, *B*, and *C* design to burn *D's* house. *A* stays at home, and *B* and *C* burn *E's* house and kill *E*. Is *A* liable?

29. In what cases is a principal liable for the crimes of his agent?

30. Distinguish a principal from an accessory, and the two degrees of principal.

31. Are there ever accessories in misdemeanors? Explain.

32. Distinguish an accessory before the fact from one after the fact.

After completing the work, add and sign the following statement:
I hereby certify that the above work is entirely my own.
(Signed)

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